No. 03-218

# In the Supreme Court of the United States

JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

*v.*

AMERICAN CIVIL LIBERTIES UNION, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

The Child Online Protection Act (COPA) addresses a serious and escalating national problem. A staggering number of pornographic sites are on the World Wide Web; most offer free pornographic teasers that are designed to lure viewers to purchase other material on the site; and millions of minors are viewing those teasers, many deliberately, many inadvertently. COPA is a narrowly tailored response to that problem, which has been recognized as urgent and compelling by all three branches of our Government on numerous occasions. In accordance with the guidance furnished by the Court in *Reno* v. *ACLU*, 521 U.S. 844 (1997), COPA shields minors from the narrow category of material that appeals to the prurient interest of minors, is patently offensive with respect to minors, and lacks serious value for minors; it covers only commercial enterprises that regularly display such pornographic material; and it applies only on the Web, where operators can easily place harmful

material behind age verification screens, and adults can easily obtain access to such material by presenting an adult ID or a valid credit card.

For more than two decades, numerous States have enforced laws that require stores to place the same category of material behind blinder racks, in sealed wrappers, in opaque covers, or behind the counter. Courts of appeals and state courts have consistently upheld such laws on the ground that they further the government's compelling interest in protecting minors from material that is harmful to them, without preventing adults from gaining access to such material. COPA is constitutional because it pursues the same objective in a comparable manner.

Respondents argue that COPA is unconstitutional for four reasons: First, that COPA's screening obligation applies to an unacceptably broad range of material even if the government's interpretations of COPA are correct, Resp. Br. 28-37; Second, that the government's interpretations are incorrect and that COPA, in fact, applies to a broader range of material, *id.* at 37-39; Third, that COPA's screening obligation imposes an undue burden on Web operators who display harmful material and adults who seek access to it, *id.* at 40-48; and Fourth, that there are less restrictive and more effective means than COPA to further the compelling interest in shielding minors from harmful material. *Id.* at 21-24, 48-49. Each contention is without merit.

## I. COPA'S SCREENING OBLIGATION APPLIES TO A NARROW AND CONSTITUTIONALLY PERMISSIBLE RANGE OF MATERIAL

COPA's screening obligation applies only to material that appeals to the prurient interest of minors, is patently offensive with respect to minors, and lacks serious value for minors. 47 U.S.C. 231(e)(6). In evaluating whether material falls within that three-part test, the relevant question is whether the material has those characteristics with respect

to normal 16 year-olds. Gov't Opening Br. 29-32. And, in making that determination, the material must be evaluated in the context in which a Web operator presents it. *Id.* at 26-29.

Respondents argue that, even under the government's interpretation of COPA, it applies to an unacceptably broad range of material. Resp. Br. 28-37. The congressional harmful-to-minors definition, however, is firmly grounded in this Court's decisions. It parallels the harmful-to-minors definition that this Court upheld in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), as an appropriate standard for States to use in restricting the sale of harmful material to minors. It tracks the definition that States, in reliance on *Ginsberg*, have used in requiring local stores to place harmful material in blinder racks, in opaque covers, in sealed wrappers, or behind the counter. *E.g.*, *Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d 618, 621 (Va. 1988). And it is patterned on the three-part obscenity definition that this Court adopted in *Miller* v. *California*, 413 U.S. 15, 24 (1973), except that COPA requires each of the obscenity inquiries to be made with respect to minors rather than adults.

In adopting the three-part *Ginsberg/Miller* standard, Congress was carefully following the guidance prescribed by this Court. In doing so, it sharply limited the scope of COPA's screening obligation to material that society has always viewed as inappropriate for viewing by minors. The House Report on COPA explains that the screening obligation applies only to materials "that are clearly pornographic" and not to "entertainment, library, or news materials that merely contain nudity or sexual information, regardless of how controversial they may be for their political or sexual viewpoints." H.R. Rep. No. 775, 105th Cong., 2d Sess. 28 (1998). The Senate Report also makes it clear that the screening obligation does not apply to "public health information, art, literature, and political information."

S. Rep. No. 225, 105th Cong., 2d Sess. 13 (1998). COPA's screening obligation therefore applies only to a narrow and constitutionally permissible range of material. Respondents' contrary arguments are each based upon unfounded exaggerations of COPA's scope.

### A. COPA's Screening Obligation Does Not Apply To The Serious Treatment Of Sexual Issues

1. Respondents' assertion that COPA's screening obligation is too broad because any frank discussion about a sexual issue may be found by a jury to be harmful to minors, Resp. Br. 31-35, is unwarranted. A serious discussion about a sexual issue has serious value for older minors and is therefore excluded from COPA's coverage as a matter of law.

It is true that some communities regard sex education as too controversial to be taught in public schools, and some individuals and groups object to the promotion of certain points of view about sexual issues. Resp. Br. 32-33. But COPA does not apply to material simply because it happens to address a controversial or sensitive subject. No matter how controversial or disfavored, material falls outside COPA as long as it has "'serious literary, artistic, political, or scientific value' for a legitimate minority of older, normal adolescents." *American Bookseller Ass'n*, 372 S.E.2d at 624. Nor is that determination left to a jury's unbridled discretion. The courts must independently apply, "as a matter of law, a national floor" with respect to when the serious value standard is satisfied. *Reno* v. *ACLU*, 521 U.S. at 873.

More than 20 years ago, the Virginia Supreme Court performed that precise function, holding that Virginia's prohibition against public display of harmful-to-minors material did not apply to two books containing explicit but serious discussions of sexual issues: Alex Comfort & Jane Comfort, *The Facts of Love* (1979), and *The New Our Bodies, Ourselves* (Jane Pincus & Wendy Sanford, eds. 1984). See *American Bookseller Ass'n*, 372 S.E.2d at 622. Because

COPA incorporates the serious value prong of state display laws, H.R. Rep. No. 775, *surpra*, at 13, the result under COPA would be the same.

2. Respondents make a comparable misjudgment in contending that the material they offer on their Web sites demonstrates that COPA has an unjustifiable scope. See Resp. Br. 2-5, 29-30. All of that material which seriously addresses sexual issues is excluded from COPA's coverage. For example, the articles on the Sexual Health Network that address sexual issues for persons with disabilities have serious scientific value for many older minors. See Sexual Health Network, Inc., *Sex Therapy Expert Education* (visited Feb. 18, 2004) <http:/www.sexualhealth.com>. Likewise, Patricia Nell Warren's date rape article has serious literary value for many older minors, see 2 C.A. App. 732-736, and Planet Out's Dr. Ruthless show addresses topics that have serious scientific value for many older minors. *Id.* at 658.

Other examples furnished by respondents are more explicit and provocative, but still fall within the broad serious value exclusion that Congress established. For example, Blackstripe's essay on racism and sexuality has serious literary and political value for a legitimate minority of older minors, C.A. App. 753-757, and A Different's Light's essay on sexual shame has serious literary value for a legitimate minority of older minors. *Id.* at 609-612. As those examples illustrate, articles that provide information or an intellectual perspective on a sexual issue fall outside COPA's coverage, no matter how controversial the viewpoint or provocative the method of expression.

The government previously identified three of respondents' exhibits as borderline examples that might not be excluded from COPA's coverage as a matter of law. Reply Br. at 9, *Ashcroft* v. *ACLU*, 535 U.S. 564 (2001) (No. 00-1293) (citing 2 C.A., App. 617-620, 710-713, 745-748). As the Solici-

tor General then explained at oral argument, however, that evaluation was based on a review of the exhibits put forward by respondents extracted from their context, and that material would be seen differently when examined in the context of the Web site from which they were extracted. *Ashcroft* v. *ACLU*, Arg. Tr. 22-23. For example, in the context of the ArtNet Web site, Serrano's photographs likely have serious artistic value for a legitimate minority of older minors. See 2 C.A. App. 710-713. In the context of the Salon Web site, Susie Bright's column likely has serious literary value for a legitimate minority of older minors. See *id.* at 617-620.[1]

Thus, far from demonstrating that COPA has an unjustifiable scope, respondents' examples actually underscore the point that COPA's restrictions exempt material that seriously addresses sexual issues and is limited to material that is clearly pornographic. On the other hand, examples of such clearly pornographic material on the Web, which is what Congress was targeting when it enacted COPA, are included in the government's exhibits. Those exhibits demonstrate the compelling need for COPA's screening requirement. 2 C.A. App. 758-812.

3. Respondents stretch to formulate the contention that the exclusion of material that has serious literary, artistic, political, or scientific value is insufficient because it does not expressly exclude material that has serious educational value. Resp. Br. 35. But that is simply another straw man. Material that has serious educational value would fall within one or more of the identified categories—all of which are intended to be read broadly. For example, respondents express concern that sex education might not be exempted

[1] Because the RiotGirrl site is no longer in existence, a determination whether the excerpt is harmful to minors when viewed in context cannot be made. See 2 C.A. App. 745-748.

from COPA's screening obligation, *ibid.*, but legitimate sex education has serious scientific value for older minors.

Respondents next fault COPA for failing to exempt material that has entertainment value. Resp. Br. 35. This Court has never intimated that Congress would be required to create such an elastic exception. Material intended to entertain will generally fall outside of COPA because it either does not appeal to the prurient interest, does not contain patently offensive descriptions of sexual acts, or has serious literary or artistic value. But graphic pornography is not exempt from COPA simply because some viewers might find it "entertaining," *i.e.*, diverting or engaging. The *Miller* Court did not categorically exempt material that has entertainment value from the definition of obscenity, 413 U.S. at 24, presumably for the obvious reason that such a vague term could include virtually anything. And Congress acted within constitutional limits in following the same approach in COPA.

### B. COPA Does Not Apply To A Web Operator's Hosting Of Chat Rooms And Discussion Boards

Respondents contend that COPA's screening obligation is excessively broad because it applies to chat rooms and discussion boards. Resp. Br. 29-30, 40-41. In particular, respondents argue that, because there is no way to place harmful postings behind an age verification screen without also placing non-harmful postings behind such a screen, COPA's screening obligation has the impermissible effect of burdening communications that are not harmful to minors. *Id.* at 40-41. That argument ignores the express exemption from COPA for chat rooms and discussion boards.

Under that exemption, COPA's screening obligation does not apply to persons to the extent that they are "engaged in the * * * hosting * * * of a communication made by another person, without selection or alteration of the content of the communication." 47 U.S.C. 231(b)(4). That exemption

relieves a Web operator from any duty to screen material that visitors post in chat rooms or on discussion boards. As long as a Web operator is simply performing the typical function of hosting a chat room or discussion board and does not select or alter the content of individual postings, COPA's screening obligation is not triggered.

Respondents are mistaken in asserting that this exemption is lost when the Web operator selects a *topic* for discussion. Resp. Br. 41. That common practice still leaves "the selection" of the "*content*" of a particular posting up to the person visiting the chat room or discussion board. A different rule might apply if the topic, by definition, invited only harmful-to-minors communications (*e.g.*, "post your most lurid and arousing xxx fantasies"). But barring that circumstance, the selection of a topic does not involve the selection of content within the meaning of the exemption. Respondents' alternative reading would eviscerate the exemption and force Web operators to undertake the very pre- screening of chat room and discussion board postings that COPA intended to exempt. Respondents' reading would also violate the principle that statutes should be read to avoid constitutional problems, rather than to create them. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994)—a principle respondents repeatedly ignore.

### C. COPA Constitutionally Applies To Material That Is Displayed In Order To Generate A Profit, But Is Not For Sale

Respondents contend that COPA is unconstitutional because it applies to material that Web operators do not offer for purchase. Resp. Br. 30-31. But Congress had no intention to limit COPA's coverage to material offered for purchase because that would have allowed pornographic Web sites to continue their pervasive practice of making available free sexually explicit teasers to minors of all ages.

Moreover, other strategies for profiting from free pornography have begun to flourish that would exploit such a loophole. For example, some Web sites now display free pornographic material obtained from larger sites and earn revenue by channeling traffic to the larger sites; for every channeled user who subscribes to the larger site, the smaller site receives a percentage of the fee. Similarly, some Web sites post free pornographic material and then automatically forward their exit traffic to other sites in return for a per-customer fee. See Computer Science and Telecommunications Board, National Research Council, *Youth, Pornography, and the Internet* 73, 75 (Dick Thornburgh & Herbert S. Lin eds., 2002). Those emerging businesses pose a serious danger to minors and demonstrate the wisdom and constitutionality of Congress's judgment not to limit COPA's screening obligation to material offered directly for purchase.

### D. The "As A Whole" Requirement, Properly Applied, Provides Fully Adequate Constitutional Protection

Respondents contend that the "as a whole" requirement, as interpreted by the government, provides insufficient constitutional protection. Resp. Br. 35-37. But the "as a whole" requirement ensures that material is subject to COPA's screening requirement only when it is harmful to minors in the context in which it is presented. That approach faithfully tracks this Court's approach in comparable circumstances, *Kois* v. *Wisconsin*, 408 U.S. 229, 231 (1972) (per curiam); *Roth* v. *United States*, 354 U.S. 476, 490 (1957), and this Court has given no indication that it would not provide constitutionally sufficient protection in the context of the Internet medium.

Respondents object to the government's statement in its opening brief that if a Web site invites persons to "click for xxx pictures," and that click sends the viewer to a portion of the site that contains explicit pictures, the highlighting

feature would be an important part of the context in which the highlighted material is presented. Resp. Br. 36 (referring to Gov't Opening Br. 29). The government's explanation, however, simply articulates an application of the principle established in *Ginzburg* v. *United States*, 383 U.S. 463, 470-471 (1966), that when material is *promoted* as sexually arousing, rather than for its intellectual content, a court may take that factor into account in deciding whether the material is obscene. That same principle applies in deciding whether material is harmful to minors. See 47 U.S.C. 231(e)(6)(A) (part of test is whether the material "is designed to pander to[] the prurient interest").

Respondents incorrectly assert that COPA's contextual approach would mean that the coverage standard would vary depending on the volume of material on a site. Resp. Br. 37. On the contrary, the material would be examined in light of the general character of the Web site, not on the basis of the number of works on the site.

## II. THE GOVERNMENT'S COMMON SENSE INTERPRETATIONS OF COPA ARE CONSISTENT WITH COPA'S TEXT AND CONGRESS'S INTENT

Respondents contend that COPA should be interpreted much more broadly than the government contends. Resp. Br. 37-39. That is an unjustified attack on a carefully limited statute.

### A. COPA's Screening Obligation Does Not Apply To Material That Has Serious Value For Older Minors

Respondents contend that COPA's serious value component does not incorporate an older minor standard. Resp. Br. 37. But Congress enacted COPA against the background of state harmful-to-minors display laws that had been repeatedly construed by the judiciary to exclude material that has serious value for older minors. *American Booksellers Ass'n*, 372 S.E.2d at 624; *Davis-Kidd Booksellers*,

*Inc.* v. *McWherter*, 866 S.W.2d 520, 533 (Tenn. 1993); *American Booksellers* v. *Webb*, 919 F.2d 1493, 1504-1505 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991). Congress deliberately borrowed the "familiar" definition of "harmful to minors" from those laws and consistent judicial interpretations. H.R. Rep. No. 775, *supra*, at 13 (citing cases),

Respondents err in contending that the older minor standard is inconsistent with Congress's intent to protect minors who are younger than 16. Resp. Br. 37. Just like state display laws, after which it was patterned, COPA protects *all* minors from material that lacks serious value for older minors. In that way, COPA protects all minors from the most harmful material on the Web, without interfering with the interest of older minors in obtaining access to material that has serious value for them. No law would represent a perfect fit with every age; Congress adopted the most practical, and judicially approved, constitutional approach.

### B. COPA Does Not Apply To Web Operators Who Only Occasionally Post Harmful Material

Respondents argue that COPA applies to persons who only occasionally display harmful material. Resp. Br. 38. But COPA's commercial purposes definition limits COPA's screening obligation to persons "engaged in the business" of making harmful-to-minors communications, 47 U.S.C. 231(e)(2)(A), and a person is engaged in the business of making harmful-to-minors communications only if that is "a regular course" of that person's business. 47 U.S.C. 231(e)(2)(B). That "regular course" requirement is modeled on a similar "regular course" requirement in the federal prohibition against distribution of obscenity. H.R. Rep. No. 775, *supra*, at 27 (discussing 18 U.S.C. 1466(b)). Well before COPA was enacted, that requirement had been judicially construed to limit the prohibition to persons who "regularly traffic" in obscenity. *United States* v. *Skinner*, 25 F.3d 1314,

1319 (6th Cir. 1994). Because of the "regular course" requirement, a person is covered by COPA only by making regular harmful-to-minors communications. A person who occasionally makes such a communication is not covered.

Respondents urge a vastly broader interpretation on the ground that anything less would render meaningless Congress's intent to cover "any" harmful material. Resp. Br. 38. (citing 47 U.S.C. 231(a)(1) and (e)(2)(B)). But Congress's intent must be determined based on all parts of the statute read together. When COPA is read as a whole, COPA's screening obligation manifestly applies only to Web operators who regularly display harmful material. 47 U.S.C. 231(e)(2)(B). Once a Web operator crosses that threshold, he must then place "any" harmful material on his site behind an age verification screen. 47 U.S.C. 231(a)(1).

### C. COPA's "As A Whole" Requirement Is Sufficiently Clear And Administrable

1. Respondents contend that COPA's "as a whole" requirement is impractical to administer because some Web sites contain many pages of material. Resp. Br. 38. But a Web operator can reasonably be expected to be familiar with the general character of his Web site and the overall nature of his communications. Those individuals are in the best position to know whether they are in the business of posting harmful-to-minors material. Moreover, COPA imposes its screening obligation only upon a person who "knowingly and with knowledge of the character of the material" makes harmful communications. 27 U.S.C. 231(a)(1). A person who truly lacks such knowledge cannot be held liable under COPA. Courts are surely capable of providing additional assurance that these limitations are respected.

2. Respondents mistakenly argue that COPA leaves unclear whether a Web operator's links to other sites will be considered in the "as a whole" evaluation. Resp. Br. 39. That argument ignores the plain language of the statute.

Under 47 U.S.C. 231(b)(3), a person does not make a covered communication when he provides an "Internet information location tool," and an information location tool includes a "link." 47 U.S.C. 231(e)(5). Thus, under COPA, a person does not make a covered communication when he links his Web site with another. That exemption reflects a congressional judgment that a Web operator's responsibility is limited to ensuring that his own site complies with COPA; he is not responsible for the failure of another Web site to comply with COPA's screening requirement. It would therefore be inconsistent with Section 231(b)(3) and its purpose to consider a Web site's links in making the "as a whole judgment."

## III. COPA DOES NOT IMPOSE AN UNREASONABLE BURDEN ON WEB OPERATORS OR WEB VIEWERS

Notwithstanding respondents' rhetoric to the contrary, Resp. Br. 41-45, the burdens of COPA's affirmative defenses are modest, and well within the constitutional limits that apply to legislation that furthers a compelling interest.

### A. Adult IDs And Credit Cards Involve Modest Burdens

1. A Web operator may comply with COPA by requiring either an adult ID or a credit card as a condition of obtaining access to harmful material. Neither system imposes an undue burden on the Web operator or Web user.

Numerous services provide adult IDs. Pet. App. 141a. One such service will provide a screening service at no cost to the Web operator. *Ibid.* In fact, the Web operator can earn commissions by referring users to the service. *Ibid.* An adult ID system is also easy and relatively inexpensive for the viewer to use. When the viewer comes across screened material, he can immediately click on a link to the adult ID service, purchase an adult ID for $16.95 good for an entire year, and return immediately to the site. *Id.* at 141a-142a.

The cost of credit card verification systems begin as low as $300, Pet. App. 138a, a cost that millions of Web

businesses, including respondents A Different Light, Salon, and PlanetOut, have been willing to absorb. A credit card system also involves transaction costs, but those costs can be kept to a minimum by using a credit card service just once per year for each user and then storing the number on the site. *Id.* at 140a. Credit card services currently charge Web operators 15 to 25 cents for each transaction. *Id.* at 139a. Under a credit card system, users need not incur a cost.[2]

2. Respondents assert that 75% of users would be deterred by registration requirements. Resp. Br. 44. The district court did not credit that evidence, however, and found only that sites could lose "some adult users" of material behind age verification screens. Pet. App. 147a. The court's failure to credit respondents' evidence is understandable. Millions of persons use adult IDs and credit cards on the Web. Pet. App. 142a; 2 C.A. App. 503-504. That experience undermines respondents' dire predictions about the effect of registration requirements, which also ring hollow inasmuch as respondents such as Salon require registration in order to obtain access to some of their content. *Salon.com* (visited Feb. 11, 2004) <http://sub.salon.com/registration>. *The New York Times* and *The*

[2] Respondents claim that they might have to charge users for credit card verification because credit card services may be unwilling to perform authorization-only verifications. Resp. Br. 43. But the reluctance of credit card services to perform authorization-only transactions exists because they currently profit primarily from user charges, rather than authorization fees. 2 C.A. App. 497. There is no evidence that credit card services would be unwilling to perform authorization-only transactions if Web operators would pay a sufficient amount to make that service profitable. It would be up to the Web operators whether to pass that additional cost on to users or absorb the cost themselves. Respondents also assert that credit card access will not help anyone who does not have a credit card, Resp. Br. 44, but respondents have not offered any evidence on the number of adult Web users who both lack a credit card and cannot obtain one. In any event, a person who does not have a credit card can obtain an adult ID with a driver's licence or a passport. Pet. App. 142a.

*Washington Post*, in fact, impose registration requirements for most of their content.

### B. COPA's Modest Burdens Are Comparable To Limitations On Obtaining Adult Material In Other Settings

The modest burdens associated with COPA's affirmative defenses are analogous to the burdens associated with obtaining access to adult material in other settings, such as adult book stores, night clubs, and R-rated movies. It is common in those settings to have to furnish proof of age. The same is true with respect to state display laws that protect minors from material that is harmful to them.

Respondents argue that COPA imposes more significant burdens than state display laws because COPA requires adults to pay for material that otherwise would be free and imperils an adult's anonymity. Resp. Br. 46. But millions of people seeking access to pornographic material have been willing to pay the minimal cost of an adult ID, and a credit card system need not cost the user anything. Moreover, a person retains greater anonymity using an adult ID or credit card in the privacy of his home than he does pulling a magazine out of a blinder rack in a public place and paying for it in a face-to-face transaction, quite often in convenience stores equipped with a camera or closed-circuit television system. That is particularly true since COPA requires Web operators to maintain the confidentiality of information that is provided to them for screening purposes. 47 U.S.C. 231(d)(1). Credit cards are routinely used to purchase books, rent videos, or buy pharmaceuticals in the context of no greater confidentiality protections.

Respondents' position thus reduces to the argument that a law that serves an objective that all three Branches of the Nation's government have recognized as compelling is unconstitutional if it imposes any burden, no matter how common or reasonable, on adults. This Court, however, has repeatedly held that Congress has authority to enact laws

that are narrowly tailored to protect minors from harmful material. *Reno* v. *ACLU*, 521 U.S. at 864-865; *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989); *Ginsberg*, 390 U.S. at 639. That authority necessarily includes the power to place reasonable burdens on adults when that is necessary to protect minors from harmful material. Any other rule would strip Congress of the ability to vindicate that compelling interest.[3]

## IV. COPA IS EFFECTIVE AND NO ALTERNATIVE IS AS EFFECTIVE

### A. COPA Is The Most Effective Way To Address Domestic Commercial Pornography On The Web

Respondents err in arguing that COPA is unconstitutional because it may not eliminate entirely access to pornography on foreign Web sites. Resp. Br. 48-49. It is true that, despite COPA's application to communications in "foreign commerce," 47 U.S.C. 231(a)(1), enforcement of COPA against foreign sites may involve practical difficulties, just as it may be more difficult to enforce other U.S. laws abroad. The proliferation of freely accessible pornography on commercial domestic Web sites, however, is itself a major problem, and Congress could reasonably determine that it bears a special responsibility to protect minors who have access to the Web from harmful-to-minors material that originates in

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[3] Respondents briefly renew their objection to COPA's reliance on community standards. Resp. Br. 47. But this Court has already held that COPA's reliance on community standards does not itself render COPA facially overbroad. *Ashcroft* v. *ACLU*, 535 U.S. 564, 585 (2002). COPA's community standards requirement may be appropriately implemented through an instruction that directs jurors to apply community standards without referring the jury to a particular geographic community. *Id.* at 576 (plurality opinion). To the extent the Court concludes that it is constitutionally necessary, COPA may also be validly implemented by directing a jury to apply a national adult standard with respect to what is harmful to minors. See 535 U.S. at 589 (O'Connor, J.); *id.* at 589-590 (Breyer, J.) (citing H.R. Rep. No. 775, *supra*, at 28).

the United States. Congress was entitled to address that phase of the problem with the most effective means possible— COPA's mandatory screening obligation.

The successful implementation of COPA domestically, moreover, can serve as a catalyst for further action. If the United States is successful in requiring pornographic businesses that operate in this country to place harmful material behind age verification screens, it will facilitate the government's ability to seek assistance from foreign countries to address the phase of the problem that is associated with foreign Web sites.

### B. Filtering Software Can Complement COPA, But It Cannot Function As A Suitable Replacement

1. Contrary to respondents' contention, the use of filtering software is not an adequate substitute for COPA's mandatory screening obligation. Resp. Br. 49. As applied to domestic Web sites, reliance on filtering software alone would have numerous deficiencies and would not be nearly as effective. Under respondents' proposal, for example, no one would have an obligation to place filtering software on a computer. Minors could therefore obtain access to harmful material on a friend's computer or on other computers that lack blocking software. Filtering software blocks access to some sites that contain no harmful material, and it permits access to some sites that contain such material. Minors can find ways to defeat blocking devices. See Haselton, Bennett, *WINnocence* (Nov. 9, 2003) <http://www.peacefire.org/info/winnocence.shtml> (directions for disabling leading software programs). Software can be expensive for parents to purchase and difficult for them to operate, and it must be updated periodically at an additional cost. Unfortunately, software always lags behind the latest proliferation of new pornography, and commercial pornographers have a strong incentive to outpace filtering software in order to generate additional traffic. Because COPA does not have those

deficiencies, it is far more effective as applied to domestic Web businesses that regularly display harmful material.

Moreover, the government not only has an interest in aiding parents who wish to protect their children from the harmful effects of pornographic material. It also has an independent interest in the well being of the Nation's minors. *Reno* v. *ACLU*, 521 U.S. at 865. Reliance on the voluntary use of filtering software by parents, many of whom lack the skill, time, energy, or motivation to use it effectively, would not vindicate that independent yet important national interest.

Respondents also ignore the critical point that COPA and filtering software do not present an either-or choice. Both can work together to address the serious problem of pornography on the Internet, and that comprehensive approach is far more effective than reliance on filtering software alone.

2. The reports issued by the Commission on Child Online Protection (COPA Commission) and the National Research Counsel (NRC), relied on by respondents (Resp. Br. 14-17), do not affect the validity of Congress's judgment that COPA is necessary to further the government's compelling interest in protecting minors from harmful material. Congress established the COPA Commission to study methods to help reduce access by minors to harmful material, 47 U.S.C. 231 note, and authorized the Attorney General to request NRC to study the same issue. Protection of Children From Sexual Predators Act of 1998, Pub. L. No. 105-314, § 901, 112 Stat. 2991. Both entities issued reports to Congress. See Commission on Child Online Protection, *Report to Congress* (2000); *Youth, Pornography, and the Internet, supra.* Respondents argue that the reports support a preference for filtering software and other methods over COPA. Resp. Br. 14-17. They are simply incorrect.

While Congress asked the COPA Commission and the NRC to prepare reports, the reports reflect the views of

those entities, not Congress. The reports are not "congressional reports," Resp. Br. 14, and they were not intended to substitute for congressional hearings and findings. *Id.* at 15 n.4. Before enacting COPA, both the Senate and the House held hearings, and Congress made its own findings based on those hearings. See Gov't Opening Br. 3; S. Rep. No. 225, *supra*, at 8-9; 47 U.S.C. 231 note. This Court owes deference to Congress's legislative judgment expressed in a statute approved by Congress and the President.

In any event, both reports detail the deficiencies of filtering software and both recommend against relying on filtering software alone. *Report to Congress*, *supra*, at 9, 21, 45; *Youth, Pornography and the Internet*, *supra*, at 301-302. And while both reports voice concerns about COPA, neither challenges COPA's fundamental premise and national legislative judgment—that COPA is the most effective method of protecting minors from domestic commercial pornography on the Web, and that COPA and filtering software in combination are far more effective in protecting minors than filtering software alone.

### C. The Other Laws Cited By Respondents Are Insufficient To Fulfill The Government's Compelling Interest In Protecting Minors From Harmful Material

Respondents argue that the enforcement of obscenity laws is a less restrictive way to protect minors from harmful material. Resp. Br. 21-22. But as this Court has repeatedly recognized, the government has a distinct compelling interest in protecting minors from material that is not obscene by adult standards, but is obscene and harmful with respect to minors. *Reno* v. *ACLU*, 521 U.S. at 864-865; *Sable*, 492 U.S. at 126; *Ginsberg*, 390 U.S. at 639. Enforcement of obscenity laws does nothing whatever to advance that distinct compelling interest.

Respondents' reliance on three other congressional enactments is equally misplaced. Resp. Br. 22, 49. As respon-

dents note, the Children's Internet Protection Act (CIPA) mandates the use of filtering software in libraries that receive federal Internet-related assistance. See *United States* v. *American Library Ass'n*, 123 S. Ct. 2297 (2003). An Act of Congress establishes a special kids.us domain that contains sites that are not harmful-to-minors. Dot Kids Implementation and Efficiency Act of 2002, Pub. L. No. 107-317, 116 Stat. 2766. And Congress has required Internet Service Providers to make persons aware of the availability of filtering software. 47 U.S.C. 230(d).

Those measures, however, have only a limited effect. CIPA does not apply to libraries that do not receive Internet-related federal assistance or to the tens of millions of computers in private homes; the kids.us domain offers only a limited number of sites for minors to explore; and providing information about filtering software cannot ensure that the software will be widely used or overcome the limitations of that tool discussed above. Thus, while those three enactments offer some measure of protection to minors, and can work together with COPA to ameliorate the problem of pornography on the Internet, none offers a comprehensive solution to the problem or eliminates the compelling need for COPA's mandatory screening obligation.

## CONCLUSION

For the foregoing reasons, as well as those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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